

INFORMATION BULLETINS



Information Bulletin



July 1990

Number 1

Policy Guidance

The questions and issues below have been raised by Tidewater local governments concerning implementation of the Chesapeake Bay Preservation Act and regulations. The Chesapeake Bay Local Assistance Department has identified the salient questions and applicable statutory and regulatory requirements.

1. What are the obligations of local governments under the provisions of §§ 4.2.7.b. (reserve septic system drainfield criterion) and 4.3.B. (buffer area criteria) of the regulations? Must local governments enforce these provisions, which appear to take effect on October 1, 1989, prior to local adoption of performance criteria, which are not required until September 20, 1990? If not, how are local governments to implement these regulations in the absence of local ordinances?

Statutory and regulatory requirements:

- *The Chesapeake Bay Preservation Act provides that local governments must designate Preservation Areas not later than twelve months after adoption of criteria by the Board.*
- *The Chesapeake Bay Preservation Act expands local police powers to protect the quality of state waters.*
- *Adoption of performance criteria and designation of Preservation Areas must be accomplished concurrently.*
- *For on-site sewage systems, new construction on lots recorded after the effective date (October 1, 1989) will only require a reserve drainfield site after the locality has enacted an ordinance putting such requirement into effect.*
- *Lots recorded after the effective date must only incorporate a buffer area adjacent to other Resource Protection Areas if they are used, developed, or redeveloped after the locality puts such requirements into force by ordinance.*

Given these factors, the Department proposes the following guidance:

- a. The provisions that these criteria do not apply or may be varied for lots recorded prior to October 1, 1989 does not require that they be currently imposed on lots recorded after that date. None of the criteria, including the reserve drainfield site and buffer area



Printed on recycled paper

The developer proposes to record the plat showing less than 50 foot buffers on the greater portion of the lots. He proposes that some language be included with the plat indicating that the purchaser will be required to install and maintain BMPs. The problem is that the extent of the BMPs is not stated, and the purchaser may well find it too expensive to install them.

The county has taken the position that each lot should "stand alone." That is, that each lot within the subdivision should show the reserve drainfield and full buffer, allowing the future owner to install BMPs as an option. The county is concerned that if approval is given to the plat as proposed, a number of lots may require exceptions. This problem may be especially acute given the fact that the developer expects these lots to be purchased for investment, idle for perhaps 5-10 years prior to development. As one can see, the prospect exists for these lots to change hands several times, with the potential for the BMP requirement to be confused or even forgotten.

In the absence of an ordinance enforcing the buffer area and reserve drainfield requirements, there is no legal reason why a locality cannot approve a subdivision plat which fails to provide for those features in full.

Given these factors, the Department provides the following guidance:

- a. The county may place notations on the suspect parcels indicating that the lot may not meet future requirements. Use of the following language or its equivalent is suggested:

The marked lot(s) do not indicate the use of a 100 foot buffer area around Resource Protection Areas [and/or] a 100-percent reserve septic drainfield area in Resource Management Areas, as may be required under the Chesapeake Bay Preservation Area Designation and Management Regulations and local ordinances. Use of best management practices will be required to prevent the degradation of water quality. The county reserves the right to deny building permit applications for this lot unless it can be demonstrated that all use and development will comply with those regulations.

3. Do the regulations require provision of a reserve drainfield for dwellings or structures which exist at the time a local government designates Preservation Areas and adopts the performance criteria ? If not, may localities require it ? What limitations must the locality observe ?

Section 4.2.7.b. of the regulations requires a reserve drainfield for "new construction," unless the lot was recorded prior to the effective date and has insufficient capacity to accommodate the reserve field. (emphasis added)

Although the term "new construction" is not defined in the regulations, it does have a plain meaning. "Development," "redevelopment," and "substantial alteration" are defined, with the latter clearly being types of development.

practicable. It should be noted that the ability to accomplish such a requirement will be related to the workload of local sanitarian(s).

4. Does the Chesapeake Bay Preservation Act require a town to have a comprehensive plan, zoning ordinance, and subdivision ordinance? If not, may the Department enforce other statutes which require them? Should it?

Must a town have a planning commission, or, in its absence, representation on the county commission? What land use authority may a county properly assume on the part of a town?

May the Department advise the Board to exercise discretion in determinations of consistency concerning local governments which have to make wholesale changes to, or develop for the first time, local ordinances and plans?

These questions are raised with reference to a number of towns located in Tidewater Virginia, some in the Bay drainage basin and others draining to other river basins. Some of these towns have not yet developed town plans, zoning ordinances, or subdivision ordinances. Others possess town plans and zoning ordinances but lack subdivision ordinances. In addition, most if not all of the incorporated towns in question lack a planning commission or representation on the County's commission. These towns desire to implement a local program under the auspices of the Chesapeake Bay Preservation Act.

Statutory requirements:

- *The Chesapeake Bay Preservation Area Designation and Management Regulations are voluntary, not mandatory, in areas outside of the Chesapeake Bay watershed.*
- *Title 15.1 of the Code of Virginia requires local governing bodies to have comprehensive plans and subdivision ordinances and enables zoning ordinances.*
- *The Chesapeake Bay Preservation Act envisions the use of zoning, and requires it in Tidewater Virginia, but is silent regarding jurisdictions elsewhere which seek to develop water quality programs under its authority.*
- *Section 10.1-2109 of the Act requires that "all counties, cities and towns in Tidewater, Virginia shall have zoning ordinances . . ." (emphasis added). Sections 10.1-2109 B and D, which require Tidewater counties, cities, and towns to incorporate protection of water quality in their comprehensive plans and subdivision ordinances, assumes that such localities already have comprehensive plans and zoning ordinances. Section 15.1-446.1 of the Code of Virginia requires "every governing body . . . [to] adopt a comprehensive plan . . . by July 1, 1980." Section 15.1-430(a) defines "governing body" to mean "the board of supervisors of a county or the council of a city or town." Section 15.1-465 provides that "the governing body of any county or municipality shall adopt an ordinance to assure the orderly subdivision of land and its development. Such ordinance shall be adopted by July 1, 1977." Reading these statutes together with § 10.1-2109 makes clear the legislative intent to use all three mechanisms to achieve the goals of the Chesapeake Bay Preservation Act.*

category. Others have proposed to include steep slopes with gradients exceeding 15 or 25 percent or streams indicated on maps to be intermittent but proven in the field to be perennial in their Resource Protection Area. Still others desire to designate all lands outside of the RPA as their Resource Management Area.

In some localities there appears to be strong justification for designating the entire jurisdiction based on the extent of sensitive natural resources and features. There may also be administrative justifications, "equal protection" issues, and a relationship to other local programs that are consistent with the normal planning and zoning decision-making process. For instance, the Virginia Institute of Marine Science (VIMS) proposed to the Board that the entire Chesapeake Bay watershed within each Tidewater Virginia jurisdiction be designated a Preservation Area because the entire watershed contributes to the water pollution load which enters the Bay. That proposal was considered scientifically sound, but it was also considered that requiring such an approach would exceed the Board's regulatory authority with respect to a cooperative state-local program. However, a finding or determination by a locality that all the lands of the Chesapeake Bay watershed have potential for causing significant water quality degradation could support a designation of the entire watershed as a Preservation Area. The VIMS report to the Board could be referenced as support for such a finding.

Since the Preservation Act Regulations are supplemental to other land use authorities, it is important that they be integrated into the fabric of local land use regulations in a coordinated and comprehensive manner. Because this integration process may blur the distinctions between authorities extended to localities by the Preservation Act and its Regulations as well as other programs, it might be perceived that a local program is exceeding the authority of the Preservation Act when, in fact, it is not. Such perceptions may occur where a locality plans to designate its entire jurisdiction as a Preservation Area.

It should be noted that the Preservation Act Regulations are not responsible for the impacts of other regulatory programs. For example, the Regulations require that localities identify sensitive wetlands, but then direct land users and developers to the agencies that actually regulate wetlands for the necessary permits prior to commencing land disturbance and construction. This identification and designation process has the benefit of heightening a land user's or developer's awareness that certain sensitive lands may call for careful evaluation and planning to ensure a project's feasibility.

Regulatory requirements:

- *Resource Protection Areas shall consist of sensitive lands at or near the shoreline that have an intrinsic water quality value due to the ecological and biological processes they perform or are sensitive to impacts which may cause significant degradation to the quality of state waters. In their natural condition, these lands provide for the removal, reduction, or assimilation of sediments, nutrients, and potentially harmful or toxic substances in runoff entering the Bay and its tributaries, and minimize the adverse effects of human activities on state waters and aquatic resources. Land categories are directive.*
- *Resource Management Areas shall include land types that, if improperly used or developed, have a potential for causing significant water quality degradation or for diminishing the functional value*

Statutory and regulatory requirements:

- Section 2.2 of the Regulations requires that local governments must designate Chesapeake Bay Preservation Areas within twelve months of the date that criteria are adopted by the Board. Adoption of the performance criteria must be concurrent with designation.
- The Virginia Registrar of Regulations uses Webster's New Collegiate Dictionary, Eighth Edition, as the standard for defining regulatory terms. That reference includes among its definitions of the word "concurrent" the following: (1) "operating at the same time;" (2) "acting in conjunction."
- Section 2.2.B. of the Regulations requires local adoption within 12 months of the adoption date [of the Regulations] of "performance criteria applying in Chesapeake Bay Preservation Areas that employ the requirements in Part IV." (Emphasis added.) The purpose of this provision is to begin protecting water quality by requiring the use of the criteria in Chesapeake Bay Preservation Areas as soon as such areas are required to be designated. This requirement is again stated in § 4.1.A: "These criteria become mandatory upon the local program adoption date."
- Final revisions to comprehensive plans, zoning ordinances, and subdivision ordinances must be accomplished not later than 24 months after Board adoption of the criteria.
- As determined from discussions with the sponsor of the Chesapeake Bay Preservation Act, the legislative intent was that locally adopted programs be enacted and made enforceable within 12 months following Board adoption of the Regulations.
- As expressed at public meetings, there was general agreement among members of the Chesapeake Bay Local Assistance Board during development of the Regulations that local programs be implemented so that the criteria were enforceable within 12 months following Board adoption of the Regulations. The additional 12 months was allowed by the Board to allow local governments to amend related ordinances and plans to make them consistent and the program comprehensive.
- Subsection B of § 2.2 does not require that the performance criteria be included in any particular ordinance. The local government may make the criteria enforceable any way it chooses. However, subsections C through G of § 2.2 contain more specific requirements for conforming the comprehensive plan, zoning ordinance, subdivision ordinance, erosion and sediment control ordinance and plan of development process to the requirement of the regulation. Because changing these ordinances is time consuming, and some communities felt they had to be amended in a certain sequence, an extra year was provided for their amendment. Subsections D, E, and F require that within 24 months of adoption of the Regulations, the zoning, subdivision, and erosion and sediment control ordinances must require compliance with the criteria. Until that deadline, it is a local option as to what ordinance a locality uses to require compliance with the criteria.
- Section 10.1-2103.10 of the Act authorizes that Board to "[t]ake administrative and legal actions to insure compliance by counties, cities and towns with the provisions of" the Act. Section 6.2 of the Regulations concerns administrative proceedings, while § 6.3 concerns Board decisions on legal action.